

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1296

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

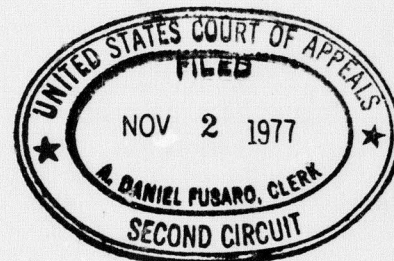
JOHN McFARLAND and
ALPHONSE BIFULCO,

Michael Thistlewhite,
Defendants-Appellants.

Bp/s
Docket No. 77-1296

Docket No. 77-1297

BRIEF FOR APPELLANT
JOHN McFARLAND



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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JOHN McFARLAND and
ALPHONSE BIFULCO,
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Defendants-Appellants.
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether the variance between the charge in the indictment and the Government's proof resulted in prejudicial error, requiring reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) convicting appellant John McFarland of conspiracy to manufacture, to possess with the intent to distribute, and to distribute phencyclidine in violation of 21 U.S.C. §§841(a)(1) and 846 and sentencing him to four years' imprisonment and ten years' special parole. Appellant McFarland was also required to pay a fine of \$2,500.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment*

On December 30, 1976, an indictment was filed charging appellant McFarland, Michael Thistlethwaite, Alphonse and Mario Bifulco, and Roseann Polimeni** with conspiring to manufacture, possess with intent to distribute, and to distribute phencycli-

*The indictment is "B" to appellants' joint appendix.

**Prior to trial co-defendant Polimeni's case was severed, and she entered a guilty plea to the indictment (820-821). Numerals in parentheses refer to pages of the trial transcript.

dine.*

B. The Government's Case

1. The DeMaio-Thistlethwaite-McFarland Conspiracy

Lawrence DeMaio, an unindicted co-conspirator, testified that during the summer of 1975, he met with appellant McFarland and co-defendant Thistlethwaite to discuss the manufacture of phencyclidine.** Appellant stated that he would supply the necessary chemicals and the location for the drug's manufacture (395).*** After a second meeting (396-397), DeMaio went to appellant's apartment where DeMaio was shown various chemicals and glass beakers (398-400).

DeMaio testified that after two unsuccessful attempts to manufacture during the end of September, 1975 (402-405), he thereafter made a component of phencyclidine -- once with Thistlethwaite and once with appellant and Thistlethwaite. At a later time, DeMaio saw appellant and Thistlethwaite making the

*The indictment also listed four individuals -- Larry DeMaio, Robert Borsillino, John Kowalchick, and Stephen Kopf -- as unindicted co-conspirators.

**At trial, phencyclidine was alternately referred to as "angel dust," "dust," or "PCP."

***Three owners of chemical companies testified as part of the Government's case. They identified various sale receipts, which were admitted in evidence. One of these individuals identified appellant McFarland as a customer, and counsel for appellant McFarland and the Government entered a stipulation that a handwriting expert would testify that appellant's signature appeared on some of these receipts (1302-1316, 1349-1352, 1473-1476, 1480-1487, 1501).

drug (406-409). After this incident, DeMaio became dissatisfied with his arrangements with appellant and Thistlethwaite, and discontinued the association (412), telling appellant that he was "not going to make it [phencyclidine] with [appellant] any more" (413).

DeMaio also testified that he met Roseann Polimeni during December of 1975 at Thistlethwaite's apartment, when Polimeni was living there. DeMaio never spoke with her about anything related to phencyclidine (451). Polimeni, a co-defendant, who prior to trial entered a guilty plea, confirmed this testimony and indicated that she did not participate in any of DeMaio's drug-related activities which involved appellant (911, 1075, 1179-1180).*

2. The Polimeni-Bifulco-Thistlethwaite Conspiracy

Polimeni also testified that she had lived with co-defendant Alphonse Bifulco from August through November, 1975 (827-828, 831) and that they had been partners in selling angel dust which they stored in their apartment. Polimeni maintained one

* Polimeni also corroborated DeMaio's testimony involving appellant and Thistlethwaite. Thus, Polimeni testified that Thistlethwaite said that he had previously gone upstate to make angel dust with appellant; that she heard Thistlethwaite and appellant discuss that possibility; that she, Thistlethwaite, and appellant once purchased chemicals at a chemical supply house; and that appellant and Thistlethwaite supplied Paul Kudniewski with phencyclidine (890-891, 1239).

In addition, Police Officer Edward Verbrooks testified that during an unrelated arrest of appellant in his apartment on July 23, 1976, the police officer seized two bags containing phencyclidine, a scale, envelopes and plastic bags, all of which were admitted in evidence (1328, 1331, 1334).

notebook and one diary as a record of her drug dealings. These materials, seized by New York City police on September 1, 1975, were entered in evidence (GX37, 38;* 831-839, 847-849, 881). Polimeni explained that the various people mentioned in the books and papers had sold drugs for her and Alphonse Bifulco and that the notations reflected the numerous transactions (932-937, 975, 929, 1014-1018, 1040, 1042, 1099-1100, 1238). Appellant's name did not appear in any of Polimeni's records (1100-1101).**

Further, Polimeni described a meeting which she, Alphonse Bifulco, and three other persons attended for the purchase of angel dust (839-841), as well as her arrest on September 1, 1975. Polimeni indicated that in an effort to purchase phencyclidine on that date, she, along with Alphonse Bifulco, Thistlethwaite, and two other individuals, drove to a number of bars (843-846, 850-851, 1051-1054), but were stopped and arrested by the police (846-847).

Over defense objections that the evidence seized during their arrest, as well as related testimony, was not probative of the conspiracy charged in the indictment against appellant (1260, 1276), phencyclidine found on Alphonse (1271), a loaded gun and a vial of barbituates discovered in Polimeni's pocket-

*Numerals in parentheses preceded by "GX" refer to the numbers of the Government's exhibit in evidence.

**Polimeni also testified that she saw Alphonse Bifulco smoke angel dust, as well as sell marijuana and pills (831-839).

book (1271), and a container of barbituates (1273), were admitted in evidence (GX55, 56, 57; 1279).

Polimeni indicated that a person named Steve Grayson originally supplied the phencyclidine which she and Alphonse Bifulco sold (835-836, 842, 1076). However, after Grayson moved to Florida, Polimeni and Bifulco discussed the need to find a new source of supply, mentioning appellant and Thistlethwaite as possibilities (836, 842-843).

Approximately one month after DeMaio had terminated his dealings with appellant, DeMaio saw Thistlethwaite, who indicated that he had recently "met two guys [named] Mario and Alphonse and that he would get them chemicals..." and that "he was going to do it with them" (414). Thereafter, in December, 1975, Thistlethwaite told DeMaio that he had made "crystals" for these two people. At Thistlethwaite's request, DeMaio met with Thistlethwaite, and "Mario" and "Al," who were identified at trial as Mario and Alphonse Bifulco. (415-416, 418-420, 423). There, DeMaio was told that he had to make phencyclidine or else he and Thistlethwaite would "wind up dead" (425-426). DeMaio and Thistlethwaite then left the apartment but were chased by the Bifulcos, one of whom had a gun (440-443, 612).

Approximately one week after this incident, DeMaio was informed by Thistlethwaite that he was attempting to terminate the agreement previously made with Mario and Al but that they

had threatened him unless he made phencyclidine (444).*

Subsequently, Thistlethwaite told DeMaio that the Bifulcos wanted five pounds of dust and \$2,000 and that they had now threatened Thistlethwaite's grandmother (446). DeMaio testified that in order to help Thistlethwaite comply with the Bifulcos' demands for dust and stop their threats, DeMaio and Thistlethwaite used appellant's apartment to make phencyclidine for the Bifulcos. Thus, while appellant was in another room, DeMaio and Thistlethwaite made three pounds of "crystals" (447-448).**

*Earlier that day, DeMaio went to Thistlethwaite's apartment house. Seeing Mario Bifulco, with Thistlethwaite and appellant in the vestibule of the building, DeMaio continued walking around the block. When he was seen by appellant in front of the building, appellant told DeMaio that appellant, Mario and John "said for [DeMaio] to get out of there" (444). During summation, the Assistant United States Attorney indicated that DeMaio's testimony about this incident had been incorrectly transcribed and that counsel had stipulated that it should have read "Yes, then Jack walked out. He told me that he and Mario and John said for me to get out of there" (449).

**Polimeni also confirmed Thistlethwaite's involvement with the Bifulcos. Thus, while living with Thistlethwaite in December of 1975 (871-872, 1163), she saw Thistlethwaite make and sell phencyclidine (872-873). Moreover, in January, 1976, when she and Alphonse Bifulco purchased chemicals, Alphonse told her that the chemicals would be given to Thistlethwaite who would make drugs for him (912, 1183-1185, 1189-1191, 1250). Further, Polimeni testified that Thistlethwaite told her that Mario Bifulco wanted him to make phencyclidine and that Mario had threatened Thistlethwaite's grandmother (873, 876, 882-883, 887, 1172-1173).

In addition, Alphonse Bifulco's personal telephone book, seized during his arrest, was entered in evidence (1368). In the book was a listing for a person named Jack (1403). By stipulation, it was agreed that a representative from the telephone company would testify that the telephone number in question was connected on October 27, 1976 and registered to appellant McFarland (1502).

C. The Defense Motions and Summation

After the close of the Government's case, defense counsel for appellant McFarland moved to strike those portions of Polimeni's testimony ("all of the testimony she gave as to conversations with other people and acts that she committed with other people") which were not related to appellant (1509). The District Court denied this request saying "I'll let it stand, let the jury weigh it" (1510).

In response, defense counsel then moved for a judgment of acquittal on the ground that the Government proved, not the conspiracy charged, but two separate and distinct conspiracies, one of which involved Alphonse Bifulco, and did not relate to appellant McFarland, and that the proof of the unrelated conspiracy prejudiced appellant McFarland's opportunity for a fair trial (1510). Judge Costantino, in denying the motion, ruled:

Though there is in the testimony which may lead to some second guessing, more or less, as to the testimony related to each defendant, the Court finds there's sufficient amount to deny the motions at this time.

(1510).

After a witness testified on behalf of co-defendant Alphonse Bifulco, appellant McFarland renewed his prior motion for a judgment of acquittal based on the Government's failure to prove one conspiracy and argued that the unrelated testimony had a "prejudicial spill-over effect." The District Court also denied this motion (1533).

During the discussion of the District Court's charge, defense counsel for McFarland submitted two requests designed to allow the jurors to determine whether the Government had proved not one, but multiple conspiracies and to limit the prejudice to appellant caused by the proof of at least two separate agreements.* Judge Costantino denied the requested instructions, over counsel's objection (1541-1542).

On summation, the Assistant United States Attorney argued that the proof showed that during the summer of 1975, appellant McFarland, co-defendant Thistlethwaite, and the witness DeMaio

*These jury instructions were as follows:

REQUEST NO. 4

Although the indictment charges a single conspiracy, it would be possible for you to find separate conspiracies, one relating to the testimony of DeMaio, in which he testified concerning the manufacture of angel dust, and the other conspiracy relating to the testimony of Roseanne Polimini, who testified as to the manufacture and sale of angel dust in a different period of time and who stated that she did not know Mr. DeMaio. Whether there was one conspiracy, or two conspiracies, or no conspiracy at all is a fact for you to determine in accordance with these instructions.

I have instructed you as to the consideration of the acts and declarations of one alleged conspirator as evidence against another alleged conspirator. You will not consider any such acts or declarations against any defendant unless you find beyond a reasonable doubt that the person doing the act or making the declaration was a member of the same conspiracy as was that defendant.

REQUEST NO. 5

If you find that the government has failed to prove the existence of only one conspiracy and has instead proven the existence of two conspiracies, then you must find the defendants not guilty.

agreed to make phencyclidine; that DeMaio terminated his association in October or November of that year; and that co-defendant Thistlethwaite then "aligns himself with two new people" (1554), co-defendants Alphonse and Mario Bifulco (1551-1557).

Counsel for appellant McFarland contended, inter alia, that the Government had failed to prove the conspiracy charged in the indictment, arguing that the proof showed that Polimeni's and Alphonse Bifulco's drug dealings were totally unrelated to appellant McFarland and constituted a separate conspiracy. Accordingly, defense counsel contended that as a result of these circumstances, acquittal of appellant McFarland was required (1633, 1637).

D. The Charge

As to the question of multiple conspiracies, Judge Costantino told the jurors:

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not

the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy (1669).

At the conclusion of the judge's charge, counsel for appellant McFarland again objected to the judge's failure to instruct the jurors as previously requested (1691). After deliberations and additional instructions, the jurors acquitted co-defendant Mario Bifulco but found appellant McFarland, and co-defendants Thistlethwaite and Alphonse Bifulco guilty as charged.

ARGUMENT

THE VARIANCE BETWEEN THE CHARGE IN
THE INDICTMENT AND THE GOVERNMENT'S
PROOF RESULTED IN PREJUDICIAL ERROR,
REQUIRING REVERSAL.

A. Prejudicial Variance

The indictment charged that appellant participated in a single conspiracy with co-defendants Michael Thistlethwaite, Alphonse and Mario Bifulco, and Roseann Polimeni to violate the Federal narcotics laws. However, at trial, the Government introduced evidence of two separate conspiracies -- one implicating appellant and Thistlethwaite, the other involving co-defendants Alphonse Bifulco and Polimeni -- as well as other unrelated illegal acts. This inconsistency between the indictment and proof established a prohibited variance, which, because it was extremely prejudicial, requires reversal of appellant McFarland's conviction. See, Kotteokos v. United States, 328 U.S. 750, 756 (1946); Berger v. United States, 295 U.S. 78 (1935); United States v. Bertolotti, 529 F.2d 149, 154 (2d Cir. 1975); United States v. Miley, 513 F.2d 1191, 1207 (2d Cir. 1975); United States v. Russano, 257 F.2d 712, 715 (2d Cir. 1958).

1. The DeMaio-Thistlethwaite-McFarland Conspiracy

Lawrence DeMaio testified that during the summer of 1975, he discussed making phencyclidine with appellant and Thistlethwaite; that appellant stated he would supply the necessary chemicals and that pursuant to these arrangements in September

or October of that year, a component of the drug was manufactured. Shortly thereafter, DeMaio became disenchanted with the arrangement and terminated his association with appellant and Thistlethwaite. DeMaio indicated that this conspiracy was a limited one, testifying that he never spoke with co-defendant Polimeni about phencyclidine and that she was not involved in his drug-related activities with appellant and Thistlethwaite. Polimeni confirmed the prior testimony that she did not participate in any narcotics transactions with DeMaio.

2. The Polimeni-Thistlethwaite-Alphonse Bifulco Conspiracy

Roseann Polimeni's testimony showed that during the summer of 1975, she and Alphonse Bifulco were partners in selling phencyclidine, which was supplied by a man named Steve Grayson. After this source became unavailable, Polimeni suggested that she and Alphonse ask Thistlethwaite to make the drug for them, which Alphonse did. Consequently, after DeMaio discontinued his dealings with appellant, Thistlethwaite formed a new partnership with "two guys named Mario and Alphonse," whom he had recently met.*

Thus, the Government's proof established two discrete, independent conspiracies for the manufacture and distribution of phencyclidine. While Thistlethwaite participated in both (See United States v. Sir Kue Chin, 534 F.2d 1032, 1035-(2d Cir.

*Indeed, on summation the Assistant United States Attorney argued this version of the facts to the jurors (1551-1557).

1976)), there was no proof of any agreement or participation by appellant in the second conspiracy involving Polimeni and Bifulco. Moreover, the Government's own evidence affirmatively showed that the contrary was true, since Polimeni and DeMaio -- key participants in their respective conspiracies -- agreed that they never had any dealings or discussions relating to drugs. Moreover, McFarland's name was absent from the very detailed accounts which Polimeni carefully maintained to record her drug transactions. While there is some evidence that appellant may have been acquainted with the Bifulcos,* such association is insufficient to support a finding of participation. United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975); United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974); United States v. Cantone, 426 F.2d 902, 904 (2d Cir.), cert. denied, 400 U.S. 827 (1970); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir.), cert. denied, 361 U.S. 863 (1959); United States v. Quintana, 508 F.2d 867, 880 (7th Cir. 1975); United States v. Keach, 480 F.2d 1274, 1287-1288 (10th Cir. 1973); United States v. DiRe, 332 U.S. 581, 593 (1948).

Moreover, the prejudice suffered by appellant as a result of this variance was severe. While the number of defendants

*DeMaio saw appellant McFarland and Mario Bifulco in the vestibule of Thistlethwaite's apartment house. Appellant McFarland's telephone number -- connected on October 27, 1976, long after the events of the summer and fall of 1975 -- was listed in Alphonse Bifulco's personal telephone book.

tried and conspiracies shown is important, see, e.g., Kotteokos v. United States, supra, 328 U.S. at 772, "[t]he true inquiry ... is ... whether there has been such a variance as to 'affect the substantial rights' of the accused." Berger v. United States, supra, 295 U.S. at 82; Kotteokos v. United States, supra, 328 U.S. 772; United States v. Sir Kue Chin, supra, 534 F.2d at 1035; United States v. Bertolotti, supra, 529 F.2d 155-156; United States v. Miley, supra, 513 F.2d at 1207; United States v. Russano, supra, 257 F.2d at 715. Here, there was grave danger of "a spill-over effect: the transference of guilt from members of one conspiracy to members of another." United States v. Bertolotti, supra, 529 F.2d at 156; see, United States v. Miley, supra, 513 F.2d at 1191. Thus, as a result of the Government's claim of a single conspiracy, appellant was subjected to voluminous testimony relating to events and criminal acts in which he took no part. This evidence included Polimeni's detailed descriptions of her extensive drug dealings over a five-month period with Thistlethwaite and Alphonse Bifulco, corroborated by carefully maintained records and books, all entered in evidence; her meeting in the summer of 1975 with Kowalchick and Kasel to discuss the purchase and sampling of phencyclidine; the September 1, 1975 seizure of phencyclidine from Alphonse Bifulco, and barbituates from Polimeni, which were admitted in evidence; and Polimeni's purchase of chemicals for Alphonse Bifulco in January, 1976. There was also testimony relating to the possession of guns by Polimeni

and the Bifulcos. Further, there was unrelated evidence as to Alphonse Bifulco's purchases of chemicals, his receipts for them with supporting handwriting analysis and identification testimony, and threats made on the life of Thistlethwaite's grandmother, Thistlethwaite, and DeMaio.

In addition, detrimental hearsay statements -- that Alphonse Bifulco and Polimeni mentioned appellant as a potential new supplier for phencyclidine, after their original source moved to Florida -- were allowed in evidence. These hearsay statements contained the only reference to appellant, Polimeni, and Bifulco, despite the proof which showed no connection whatsoever. Of course, the statements showed no association by appellant with the Bifulco conspiracy, but their implication of a connection was harmful in light of the evidence about Bifulco. Furthermore, admission of the proof of the hearsay statements was improper because it was received on the theory that appellant, Polimeni, and Alphonse Bifulco were members of the same conspiracy, when the evidence showed that the contrary was true.

Significantly, the Government's proof here did not show a highly-structured, large-scale, continuous criminal enterprise with "the vertical chain of importation, purchase, adulteration, packaging, distribution and eventual street pushing." United States v. Moten, Docket No. 77-108 et al., slip op. 5769, 5778 (2d Cir. September 6, 1977), from which the inference of participation in a single conspiracy may be drawn. See United States v. Borelli, 336 F.2d 376, 383 n.2 (2d Cir. 1964), cert.

denied, sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965); United States v. Ricco, 549 F.2d 264, 270 (2d Cir. 1977). Compare, e.g., United States v. Magnano, 543 F.2d 431, 434 (2d Cir. 1976); United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir.), cert. denied, U.S. (1974); United States v. Bynum, 485 F.2d 490, 495-497 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974); United States v. Agueci, 310 F.2d 817, 826-827 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). Rather, the evidence established two separate groups operating independently for the supply of phencyclidine, but indicated appellant's participation in only one.

B. The District Court's Instructions Failed to Guide the Jurors as to How They Were to Determine the Question of Multiple Conspiracies.

Because the issue of multiple conspiracies is generally a question for the jury, United States v. Calabro, 449 F.2d 885, 893 (2d Cir. 1971), cert. denied, 405 U.S. 928 (1972), the judge's charge is critical to a proper resolution of the issue. Defense counsel submitted two requests designed to deal with the question. He asked the judge to tell the jurors that the existence of more than one conspiracy was a question of fact for their determination; that it would be possible to find separate conspiracies, one based on DeMaio's testimony and the other on Polimeni's; that they were only to consider evidence relating to the conspiracy in which the particular defendant under con-

sideration participated; and that if the Government failed to prove one conspiracy but instead showed two, the jurors were required to acquit. The defense request, as well as its theory of the case, was supported by the evidence. Despite the circumstances, Judge Costantino failed to advise the jurors about how they were to evaluate the evidence if they found more than one conspiracy.

Since the jurors could have found that the evidence reflected two separate and distinct conspiracies with participation by at least two defendants in each, the judge should have instructed the jurors as to this theory of the case. See, e.g., United States v. Howard, 433 F.2d 505, 511 (D.C. Cir. 1970); United States v. Leach, 427 F.2d 1107, 1112 (5th Cir. 1970); United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir. 1969). He also should have instructed the jurors that if they agreed with the two conspiracy theory and if they found that the appellant belonged to only one, acquittal of appellant was required. The form of the indictment demanded this result since both conspiracies were encompassed within the language of the one count in the indictment and it was unclear which of those two conspiracies the Government had intended to allege in the accusatory language. Cf. United States v. Natelli, 527 F.2d 311, 325, 329 (2d Cir. 1975).

Further, even absent this instruction, in order to avoid the prejudice caused by proof of the separate agreement, the jurors should have been told that they were only to consider evidence relating to the conspiracy in which the particular defendant participated. Judge Costantino's instructions were not only

irrelevant to the specific problem raised by the facts of this case, but also impermissibly permitted consideration of the proof of any unrelated conspiracy as well (1671-1672) (co-conspirators' statements and acts may be considered, although they occurred in the absence of the defendant).

While a charge similar to that employed here has been approved by this Court in United States v. Tramunti, 513 F.2d 1087, 1107 (2d Cir.), cert. denied, 423 U.S. 832 (1975) (But compare United States v. Lam Lek Chong, 544 F.2d 58, 68 (2d Cir. 1976) ("the charge given stressed that the jury must find the conspiracy charged in the indictment (i.e., one in which appellants were agreed upon one or more of the objectives charged ...) (emphasis added)), the factual pattern in Tramunti is clearly distinguishable. There, the proof showed a vertically integrated, large-scale enterprise, encompassing different functional levels of individuals -- suppliers with mutual source of supply, wholesalers, and common distributors. United States v. Tramunti, supra, 513 F.2d at 1106. Thus, the essential question in Tramunti was who participated in the single conspiracy. In contrast, here there was proof of two parallel groupings for similar purposes, absent a vertically integrated structure and mutual dependence. Consequently, the critical question for the jurors in this case was whether all of the named conspirators were in the same conspiracy.

The indictment here alleged one conspiracy involving appellant, Michael Thistlethwaite, Alphonse and Mario Bifulco and Roseann Polimeni. The proof established two conspiracies, one

of which did not implicate appellant. This variance was extremely prejudicial. Further, the judge's charge did not tell the jurors how to appraise the evidence, and reversal of the judgment of the conviction is required. United States v. Bertolotti, supra.

CONCLUSION

For the foregoing reasons, reversal and remand with instructions to dismiss the indictment with prejudice, are required.

Respectfully submitted,

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I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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